

AMERICAN ARBITRATION ASSOCIATION

Case No. 01 15 004 4958
Ralph H. Colflesh, Jr., Esq.
Arbitrator

CITY OF PHILADELPHIA

and

**FRATERNAL ORDER OF POLICE
MICHAEL LUTZ LODGE 5
(Officer Cyrus M. Mann Termination)**

Appearances

For the City:

Diane Loebell, Esq.

City Law Department

Philadelphia, Pennsylvania

For the FOP:

Thomas W. Jennings, Esq.

Jennings Sigmond, P. C.

Philadelphia, Pennsylvania

DECISION AND AWARD

Pursuant to the terms of a Collective Bargaining Agreement (JX 1) by and between the parties hereto, the City of Philadelphia ("the City") and Fraternal Order of Police Michael Lutz Lodge 5 ("the FOP"), and the Labor Arbitration Rules of the American Arbitration Association ("the AAA"), the undersigned arbitrator was appointed to hear and determine the dispute described below. Upon due notice an arbitration hearing was convened at 10:00 a.m. February 19, 2016 in the AAA's offices, Philadelphia, Pennsylvania. At that time and place both parties had an opportunity to call and confront witnesses, introduce documentary and all other forms of non-testimonial evidence, and present arguments in support of their respective positions. At the conclusion of the hearing the parties summarized their cases orally in lieu of filing post-hearing briefs, and the record closed. As there are no issues effecting arbitrability, this matter is ready for adjudication on its merits.

Background:

Procedural History

The City employs a collective bargaining unit of police officers and ranking superiors that is represented by the FOP. Terms and conditions of employment for the unit are set forth in the Agreement. The parties have stipulated that the Agreement conditions disciplinary action on "just cause," and both parties recognize that the grievance procedure of the Agreement authorizes challenges when the FOP or a member believes discipline was imposed without just cause.

On June 29, 2015 the FOP filed a grievance after a Police Board of Inquiry ("PBI") finding that preceded the termination of bargaining unit member Cyrus M. Mann. (CX 6). The PBI finding came after a hearing on June 4, 2015 (CX 5), and was accompanied by a determination of wrongdoing. That finding was joined by all three members of the PBI. One of the three unequivocally recommended a 30 day suspension as a penalty. A second member recommended "30 days/ dismissal", which the undersigned interprets as indicating a penalty of *either* a 30 days suspension *or* dismissal. The third member, current Police Commissioner Richard Ross, who at the time was the First Deputy Commissioner, indicated "30 days/". Commissioner Ross explained at the hearing that he had erroneously omitted the alternative penalty of dismissal. (*Id.*).

Following his review of the PBI findings and recommendations, the then Police Commissioner, Charles Ramsey, ordered that Officer Mann be dismissed. The Commissioner's decision overruled any of the PBI members' recommendations. Consequently, Officer Mann was served with a formal Notice of Dismissal on July 20, 2015, with his dismissal effective July 19, 2015.¹

The PBI action and Commissioner's decision both followed a March 23, 2015 decision by the Department's Charging Unit (CX 6) to charge Officer Mann with acts that violated Article VI,

¹ Prior to the Notice of Dismissal, Commissioner Ramsey had filed a 30-Day Notice of Intention with Intent to Dismiss, which is tantamount to an eventual Notice of Termination. The FOP's June 26, 2015 grievance anticipated that inevitability.

Section 6008-10 of the Department's Disciplinary Code ("the Code"). (JX 4). That Section prohibits:

Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy. (*Id.*)

Under the Code, which is not a negotiated document, a violation of Section 6008-10 is punishable by anything from a reprimand to dismissal. Further, the Section provides that where dismissal is not imposed, a violation of Section 6008-10 can be counted for purposes of progressive discipline for a period of two years. (*Id.*).

The "Departmental Policy" referenced in Section 6008-10 is found in Department Directive 10, governing Discharges of Firearms by Police Personnel. (UX 2). The most recent version of Directive 10 became effective January 10, 2001. Pertinent to this case, Directive 10 advises

Above all, the safety of the public and the officer must be the overriding concern whenever the use of firearms is considered (UX 2, p. 1).

Directive 10 further notes that

Police officers shall not discharge their firearms to subdue a fleeing individual who presents no threat of imminent death or serious physical injury to themselves or another person present. (*Id.*, p. 2).

Factual History

The specific action on which Officer Mann's charges and termination are based occurred on August 9, 2012 at about 6:35 p.m. At that time Officer Mann and a partner were on patrol in West Philadelphia's 35th District when they stopped a motor vehicle containing three adult males. Subsequent to the stop, one of the males, who had gotten out of the car, shoved Officer

Mann and began to flee. According to Officer Mann, who gave chase, the suspect reached into his waistband for what the Officer suspected might be either a weapon or drugs.²

The foot chase momentarily ceased on Pemberton Street where, according to Officer Mann, the 300 pound suspect stopped and turned toward him. Officer Mann said he drew his gun and told the suspect to get on the ground. Instead, the male threatened him and grabbed for the Officer's gun. Officer Mann pushed him away and the chase recommenced with the suspect again grabbing at his waistband. The two again confronted each other in a very small alleyway. Once again the male moved toward him and tried to grab the Officer's Taser as the Officer was holding his holstered Taser in one hand and his gun in his other. During the encounter the suspect declared he was not going to go back to jail. The Officer said he no longer felt the Taser in his hand and believed the suspect had seized it and would use it on him. Officer Mann then shoved the suspect and fired three times from a distance of about two feet, striking the suspect in the back. Officer Mann said the suspect could have been turning or been turned when he shoved him and fired. (Testimony of Officer Mann; *also see* 1/20/14 interview of Officer Mann (CX 2); 8/21/14 interview of Officer Mann (CX 3); 9/18/14 report of Lieutenant David Vann of the Department's Internal Affairs Division (CX 4)). According to Officer Mann's uncontroverted testimony, the suspect had drugs in his system and on his person at the time. Officer Mann also testified that his ASP, or baton, had dropped off him during the chase.³ Finally, Officer Mann testified that the suspect continued to threaten to harm him and declared he was not going back to prison. Apparently the suspect was free on probation from a lengthy felony sentence.

There were no witnesses at the scene where the suspect was shot, and therefore Officer Mann's testimony cannot be challenged.

According to Lieutenant David Vann, who is a member of the Philadelphia Police Department's Internal Affairs Division Shooting Team, cartridge casings from Officer Mann's

² No gun was found on the suspect. However, he was in possession of drugs, which would have revoked his parole.

³ According to an IAD memorandum to Commissioner Ramsey, Officer Mann's ASP was found on the street by his partner, Officer Duy Nguyen. (CX 4, p. 4).

gun were found 10 feet from the suspect's body. At hearing before the undersigned, the Lieutenant had no explanation for that, other than that cartridges can land at various distances from their point of ejection, depending on weapon type and the explosiveness of the cartridge charge. He stated that he drew no inferences from that distance.

Lieutenant Vann further said the Philadelphia County District Attorney had reviewed the shooting and on November 27, 2013 decided not to prosecute the matter.⁴ (CX 4, p. 1). He also conceded on cross-examination that it takes a "split second" for Glock .40 caliber gun such as Officer Mann was carrying that day, to fire three rounds and that even fatal shooting victims sometimes are able to move a few feet after having been shot. However, Lieutenant Vann testified that Officer Mann had a prior shooting record in the Department for firing at a vehicle he was attempting to stop while standing in a roadway. Officer Mann was suspended four days over that incident, in which, as Officer Mann testified at hearing, he thought the driver had a gun.

Issue to be Determined:

My review of the record convinces me that the issue to be determined is the following:

Did the City have just cause to suspend without pay and terminate the Grievant, Police Officer Cyrus M. Mann; and if not, what shall the remedy be?

Arguments of the Parties:

The City

The City's major contention is that deadly force was not required in this

⁴ The Internal Affairs Division makes no recommendations as to discipline. Its function is limited to a discovery of facts.

attempted arrest because Officer Mann did not know if the suspect had a gun, had seized the Officer's Taser, or had another kind of weapon such as the Officer's ASP. In such a circumstance, the City says, deadly force was not the only option. The City says these contentions are supported by the PBI findings, as that Board is made up of police veterans who are experts in the use of deadly force. All three PBI members found Officer Mann guilty, the City emphasizes, and two of the three recommended discharge as an alternative punishment to a long suspension. In doing so, the City relies on Commissioner Ross's credible testimony that his indication on his PBI signature line was for a 30 days suspension *or* termination.

The City then argues that the actual punishment was up to the Commissioner who, in his wisdom as an experienced police executive, exercised discretion in favor of dismissal. The City further states that the Commissioner may have been rationally influenced by Officer Mann's prior discipline in a shooting incident, even though that event is not cited in the City's notice of dismissal. (JX 2). Ultimately, the City argues, the undersigned must determine if deadly force was authorized under the circumstances and Directive 10. Assuming it was not, the City urges that either the original penalty of dismissal or the alternative recommended penalty of 30 days be imposed.

Arguments of the FOP

The FOP argues that under Directive 10, Officer Pratt should be completely exonerated. In making that argument, the FOP emphasizes the circumstances: a vastly heavier suspect, flight from the police, drug possession by the suspect, physical resistance to arrest, drugs in the suspect's system, and the suspect's announced intention to harm Officer Mann in order to avoid going back to prison. Given these facts, the FOP says, the undersigned must reasonably conclude that Officer Mann reasonably felt a threat to his own life and, failing the ability to otherwise subdue the suspect and avoid the possible loss of his own life or significant bodily harm, Officer Mann used the only measure at his disposal—his gun.

The FOP says the forensic evidence, including the distance from the assumed shooting site where the cartridges were found and the fact that the suspect fell some feet from where

Officer Mann said they had struggled, is totally unpersuasive on the issue of whether or not deadly force was justified.

Finally, the FOP decries the absence from the hearing of former Commissioner Ramsey, whom it cites as the only unequivocal vote for dismissal. Without his testimony, the FOP claims, it is impossible to know the grounds for his decision to terminate Officer Mann. In fact, the FOP claims, there is no basis for any discipline against the Officer because Directive 10 condones the use of deadly force in situations in which Officer Mann found himself.

Opinion:

Any evaluation of whether just cause exists for a disciplinary action must begin with some analytic framework. Throughout my career, I have adopted as a model criteria enunciated in *Enterprise Wire Co.*, 46 LA 359 (1966), the case in which the esteemed Arbitrator Carroll Daugherty formalized the now famous Seven Tests of Just Cause. Inherent in the Tests are five fundamental principles I believe to be essential for a fair judgment of employer allegations and a prudent assessment of the penalties imposed. This methodology, I am convinced, is the most effective way to uphold the standard of just cause for both employers and employees.

In my view, to prove just cause an employer must show each of the following: (1) the existence of a rule in effect at the time of the employee's alleged act; (2) knowledge, either actual or constructive, of that rule by the accused employee; (3) a rational relationship between the rule and the employer's legitimate business interests; (4) a rational application of the rule to the employee, or, stated differently, the absence of any reason why the rule should not be applied; and, (5) the existence of the actual conduct alleged, proven, when necessary, by a full and fair investigation.

If these criteria are met, there is just cause for *some* discipline and, unless the discipline imposed is a matter of contract, the burden falls to the union to show why the discipline imposed should be mitigated. The union's evidence in that regard usually involves claims of disparate treatment, anti-union or personal animus, or disproportionality of the penalty when

the nature of the violated rule, the harm or threat caused by the violation, and the employee's length and merit of service are considered.

I now apply those principles to this case.

In Directive 10, the City has a policy that expressly governs the use of deadly force through firearms. That Policy was in effect at the time of the August 9, 2012 shooting by Officer Mann. The Policy was published by the City's Police Department and therefore was, or should have been, known by Officer Mann. Further, the Policy is obviously not only rationally related to the mission of the Department—it is absolutely essential. Finally, there is no question that the Policy can be reasonably applied to Officer Mann in that there is no evidence that he had any excuse or justification for not following it.

These conclusions establish that four of the above tests I have adopted for a finding of just cause have been satisfied by the City. However, the remaining test is critical: did Officer Mann's conduct on August 9, 2012 violate the Policy?

The City's position on this question is greatly hobbled by the fact that it has no witnesses to testify to Officer Mann's behavior. In fact, the lone witness to the shooting is the Officer himself. That being the case, unless his credibility is undermined by his own inconsistencies, by his demeanor at hearing, or by circumstantial evidence gathered during the Department's investigation, Officer Mann's account becomes definitive. In that case, the question becomes whether his account supports obedience or disobedience as regards the Policy.

Since the date of the incident on August 9, 2012, Officer Mann has given three accounts of the incident that are of record here. The first was on January 20, 2014,⁵ nearly 17 months after the incident, in an interview with the Internal Affairs Division. The account he gave then is entirely consistent in all material ways with his testimony at the hearing before me. (Id., pp. 2-3). The second was on August 21, 2014, two years after the incident, and was again given to the Internal Affairs Division. (CX 4). This too, was consistent in all material aspects to Officer

⁵ According to Lieutenant Vann, the Department did not interview Officer Mann until the District Attorney decided not to prosecute him. This is standard Department practice.

Mann's testimony at the hearing before me. The third account was the Officer's hearing testimony, taken 28 months after the incident. That testimony was offered unequivocally and in a straightforward manner with no indication of reluctance or evasion when the Officer was under direct or cross-examination.

Moreover, nothing in the Department's investigation of this case challenges Officer Mann's account. Whatever distance the suspect's body was from where Officer Mann says he fired at the suspect does not call into question the Officer's version of a close-quarters shooting, since victims of even fatal shootings may manage to move many feet from the exact spot where they were shot. The same is true regarding the distance of the spent cartridges from where Officer Mann told the Department he fired. Even Lt. Vann conceded that cartridge distance from the point of discharge can be affected by many factors.

Given the absence of anything indicating otherwise, I am constrained to accept Officer Mann's accounts of the incident. The question then becomes whether that account, accepted as true, supports the City's claim that he violate Directive 10.

As with the rest of this case, the burden of proof is on the City. In weighing whether or not the Officer breached the Directive, I must apply the clear terms of the Policy to the events that transpired on August 9, 2012 as he described those events, and decide whether or not the City has met that burden.

The key provisions of the Directive have been set forth above. Essentially, Directive 10 restricts the use of firearms to effect the arrest of fleeing suspect to those situations in which an officer faces a "threat of imminent death or serious physical injury." (UX 2, p. 2). Elsewhere the Directive defines "serious bodily injury" —which I take as the equivalent of a "serious physical injury"—as an injury "which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." (*Id.*)

The Directive also provides in its "purpose" section that "[a]bove all, the safety of the...officer must be the overriding concern whenever the use of firearms is considered." (UX 2, p.1).

On August 9, 2012 Officer Mann was confronted by a much heavier suspect who was fleeing and resisting arrest. Although he had radioed for assistance during the case, Officer Mann was alone at the time. The suspect had announced his intention not to return to prison and to, in Officer Mann's words, "f---k you up." Officer Mann had seen the man reach to or into his waistband where street weapons are often cached. During his final physical encounter with the suspect, the suspect, having lunged for the Officer's weapon, reached for the Officer's Tazer which left the Officer's hand. The Officer reasonably believed the suspect had seized the Tazer and would use it to disable him.

Given these circumstances, I find that Officer Mann had a reasonable belief that the suspect represented a threat to disable him and to do whatever other harm the suspect felt necessary to permanently end Officer Mann's efforts to apprehend him. That "other harm" could have included using Officer Mann's weapon against him or, given the suspect's huge size advantage, severely beating the Officer.

Less there be a second-guessing of what Officer Mann should have believed in those frantic seconds leading up to the shooting, I underscore the Directive's admonition that "the safety of...the officer must be the overriding concern." I interpret this as introducing an element of presumption that when actions governed by the Directive are considered concern over police and public safety must influence any decision as to whether there was compliance with the Policy's provisions. Given the circumstances of record in this case, I have no doubt that concern for Officer Mann's safety overwhelmingly justified his decision to discharge his weapon.

For those reasons, I cannot find that Officer Mann violated the Policy on August 9, 2012. Accordingly, his termination must be rescinded along with any unpaid suspension that preceded it, and Officer Mann should be made whole for all loss of pay, seniority, benefits and other emoluments of his position and his disciplinary record purged of any and all penalties and findings of misconduct in this matter, such that this matter may not be used in any decisions relating to his future employment with the Department.

An Award will be entered consistent with the foregoing.

Award:

The grievance is sustained. There was no just cause for Officer Mann's termination or any unpaid suspension related to the August 9, 2012 incident.

His termination must be rescinded along with any unpaid suspension that preceded it, and Officer Mann shall be made whole for all loss of pay, seniority, benefits and other emoluments of his position and his disciplinary record purged of any and all penalties and findings of misconduct in this matter, such that this matter may not be used in any decisions relating to his future employment with the Department.

5/9/16

Date



Ralph H. Colflesh, Jr., Esq., Arbitrator